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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HCL PARTNERS LIMITED PARTNERSHIP, on behalf of itself and all others similarly situated, Plaintiff, v. LEAP WIRELESS INTERNATIONAL, INC. S. DOUGLAS HUTCHESON, AMIN I. KHALIFA, GRANT A. BURTON, MICHAEL B. TARGOFF, JOHN D. HARKEY, ROBERT V. LaPENTA, AND PRICEWATERHOUSECOOPERS, LLP, Defendants.	**ECF CASE** Case No.: 07-cv-2245 (BTM) Hon. Barry Ted Moskowitz **LEAD PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO WESTCHESTER AND G&S' MOTION FOR RECONSIDERATION** DATE: August 15, 2008 TIME: 11:00 a.m. PLACE: Courtroom 15 (5th Floor)

KENT CHARMICHAEL, Individually and on behalf of all others similarly situated, Plaintiff, v. LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, AMIN I. KHALIFA, GRANT A. BURTON, MICHAEL B. TARGOFF, JOHN D. HARKEY, ROBERT V. LaPENTA, AND PRICEWATERHOUSECOOPERS, LLP, Defendants.	**Case No.: 08-cv-0128**

PRELIMINARY STATEMENT

In a thoughtful and well-reasoned, nine-page decision and order, this Court appointed the New Jersey Carpenters Pension and Benefit Funds (the "Carpenters Funds") as Lead Plaintiff and approved the Carpenters Funds' choice of counsel as Lead Counsel. In so doing, it denied a competing motion for lead plaintiff filed by two investment advisors, Westchester Capital Management, Inc. ("Westchester") and Green & Smith Investment Management, LLC ("G&S") (collectively, the "Investment Advisors").

The Court's decision was based upon the fact that the Investment Advisors failed to show that they had the requisite authority from their clients to prosecute the case on their behalf:

> Westchester and G&S have not shown that their clients delegated the authority to sue for losses sustained by the funds. The Certification of Lead Plaintiff, Behren states: 'Westchester Capital is the Adviser to and has full discretion and controls all investments made by the Merger Fund and The Merger Fund VL. G&S is the adviser to and has full discretion and controls all investments made by the GS Master Trust, MSS Merger Arbitrage 2, and Institutional Benchmarks Series (Master Feeder) Limited.' (Ex. B to Kaboolian Decl.) Notably,

> Behren does not state that the funds authorized Westchester and G&S to sue on their behalf.
>
> In a subsequently filed declaration, Behren reiterates that Westchester and G&S 'have unrestricted decision-making authority with respect to the funds that they advise and manage.' (Behren Decl. ¶2.) Behren further states. '*It is my understanding* that if an investment adviser has full discretion and control, as the Westchester Movants do on behalf of these funds, and is the attorney-in-fact authorized to undertake all acts, as the Westchester Movants are on behalf of these funds, then that investment Adviser has standing to commence legal action on its own behalf, including seeking to be appointed as the lead plaintiff in this action.' (Behren Decl. ¶4) (emphasis added). It is clear from this statement that there has been no specific grant of authority to sue on behalf of the funds.
>
> Although Behren states that he is 'authorized to undertake all acts' on the behalf of Westchester and G&S (Behren Decl. ¶ 3), he does not state that he has been authorized to undertake all acts on behalf of the funds.
> Accordingly, Westchester and G&S do not qualify as lead plaintiff. *See* Order Granting Motions to Consolidate, Appointing New Jersey Carpenters Pension and Benefit Fund as Lead Plaintiff, and Approving Lead Counsel Selection, dated May 22, 2008 (the "May 22 Order"), p.7.

In support of its decision, the Court cited numerous opinions from both the Southern District of California and other district courts which hold, *inter alia*, that investment advisors are required to show they have the requisite authority to sue before they can be appointed lead plaintiff. *See HCL Partners Ltd. P'ship v. Leap Wireless Int'l, Inc.*, Civ. No. 07-2245, 2008 U.S. Dist. LEXIS 43615, at *9-11 (S.D. Cal. May 22, 2008) (*citing Weisz v. Calpine Corp.*, Civ. No. 02-1200, 2002 U.S. Dist. LEXIS 27831, 2002 WL 32818827 (N.D. Cal. Aug. 19, 2002) (rejecting investment advisor as lead plaintiff because there was no evidence that it was authorized by its clients to bring securities law claims on their behalf); *In re Peregrine Systems, Inc., Sec. Litig*, Civ. No. 02-870, 2002 U.S. Dist. LEXIS 27690, 2002 WL 3276939 (S.D. Cal. Oct. 9, 2002) (pointing out that although the investment company stated that it had complete investment authority and was the attorney-in-fact with full power and authority to act in connection with its investments, the investment company did not state that it had authority to institute suit and litigate on behalf of its clients); *Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 635 (D. N.J. 2002) ("The clients' mere grant of authority to an investment manager to invest on its behalf does not confer authority to initiate suit on its behalf. StoneRidge Investment has not provided the Court [with] any indication that its members have given it authority to file lawsuits on its behalf."); *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95 (S.D.N.Y. 2005) (explaining that in order for an investment advisor to attain standing on behalf of the investors, the advisor must be granted both unrestricted decision-making authority and the specific right to recover on behalf of his clients). *See also In re Tyco Int'l, Ltd. Multidistrict Litig.*, 236 F.R.D. 62, 73 (D.N.H. 2006) (declining to appoint an investment advisor as a class representative because of failure to allege direct injury and thus, Article III standing).

Unhappy with the decision reached by the Court in the May 22 Order, the Investment Advisors now move for reconsideration pursuant to Local Rule 7.1(1) of this Court.

As explained more fully below, their motion should be denied. The Investment Advisors do not cite any newly discovered evidence or an intervening change in the law in support of their motion, nor do they argue that this Court committed clear error or that the May 22 order was manifestly unjust. Instead, they seek to improperly supplement their prior motion with purported board resolutions and unsworn, and in one case undated, "To Whom it May Concern" letters apparently generated after the underlying motions were decided. Thus, under the guise of a motion for reconsideration, the Investment Advisors seek to take a second bite at the apple. However, there is no basis for such tactics under the law.

ARGUMENT

POINT I

THE INVESTMENT ADVISORS FAIL TO MEET THE HIGH STANDARD FOR A MOTION FOR RECONSIDERATION

As this Court previously ruled, "[a] motion for reconsideration 'should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or there is an intervening change in the controlling law." *In re Amylin Pharmaceuticals, Inc. Sec. Litig.*, Civ. No. 01--155, 2003 U.S. Dist. LEXIS 7667, at *7 (S.D. Cal. May 1, 2003) (Moskowitz, J) (*citing Kona Enters. v. Estate at Bishop.*, 229 F.3d 877, 890 (9th Cir. 2000)). "A motion to reconsider is not another opportunity for the losing party to make its strongest case, reassert arguments, or revamp previously unmeritorious arguments." *Reeder v. Kanapik*, Civ. No. 07-362, 2007 U.S. Dist. LEXIS 51890, at *4-5 (S.D. Cal. July 17, 2007). "Reconsideration motions do not give parties a 'second bite at the apple'; they 'are not vehicles permitting the unsuccessful party to 'rehash' arguments previously presented…nor is a motion to reconsider justified on the basis of new evidence which could have been discovered prior to the court's ruling…'" *Id.* at *5. "Finally, 'after thoughts' or 'shifting of ground' do not constitute an appropriate basis for reconsideration." *Id.* (Citations omitted).

The instant motion for reconsideration is not based upon newly discovered evidence, an intervening change in the controlling law, or a showing that the Court committed clear error when it appointed the Carpenter Funds as Lead Plaintiff. Instead, it is based upon newly-manufactured "evidence" in the form of purported board resolutions and letters. *See* Certification of Karen E. Fisch in Support of Motion to Reconsider dated June 23, 2008, Exs. B and C.

Nothing prevented the Investment Advisors from submitting similar "evidence" when they filed their original motion, yet they chose not to do so. Nor did they seek to submit such "evidence" when they filed their reply papers despite the fact that in their opposition papers, the Carpenters Funds argued in no uncertain terms that the Investment Advisors lacked the requisite authority to sue. *See* Memorandum of Law in Opposition the Motion of Westchester Capital and Green & Smith for Appointment as Lead Plaintiff and Approval of Lead Counsel, pp.1, 7-11. The Investment Advisors untimely and improper attempt to do so now should be rejected. *See, e.g., In re Amylin Pharmaceuticals*, 2003 U.S. Dist. LEXIS 7667, at *7; *Reeder*, 2007 U.S. Dist. LEXIS 51890, at *5-6 ("courts avoid considering Rule 59(e) motions where the grounds for amendment are restricted to… contentions which might have been raised prior to the challenged judgment."); *Ayala v. Ayers*, Civ. No. 01-1322, 2006 U.S. Dist. LEXIS 91663, at *7 (S.D. Cal. Dec. 19, 2006) ("motions for reconsideration are not … an opportunity for a party to make additional arguments and raise facts that they could have, but failed to present earlier."); *Yearous v. Pacificare*, Civ. No. 07-0574, 2007 U.S. Dist. LEXIS 67314, at *4 (S.D. Cal. Sept, 11, 2007) (rejecting attempt to supplement prior motion with a declaration, holding that "this evidence was available to [the movant] and could have been offered during initial consideration of the motion.").

POINT II

THE INVESTMENT ADVISORS' BELATED ATTEMPT TO SUPPLEMENT THEIR INITIAL MOTION IS UNTIMELY

The Private Securities Litigation Reform Act of 1995 mandates that motions for appointment of lead plaintiff shall be filed within sixty days after the requisite notice is published. 15 U.S.C. § 78u-4(a) (3) (A) (i) (emphasis added). As a result, a party is precluded from supplementing their original motion after the 60-day deadline had expired. *See Singer v.*

Nicor, Inc., Civ. No. 02-5168, 2002 U.S. Dist. LEXIS 19884, at *6 (N.D. Ill. Oct. 16, 2002) (refusing to allow movant to modify amount of financial loss to correct for arithmetic error in contravention of the PSLRA's strict certification requirements) (*citing In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 818-19 (N.D. Ohio 1999) (a copy of the decision in *Nicor* was annexed to the previously–filed Declaration of Andy Sohrn, dated March 14, 2008, as Exhibit 9).

In this case, the 60-day deadline mandated by the PSLRA expired on January 28, 2008. The Investment Advisors' belated attempt to supplement that motion -- some six months after the deadline expired -- with documentation purportedly reflecting their authorization to prosecute this action is untimely under the PSLRA.

The decision reached by Judge Pauley of New York's Southern District in the *SLM* cases (a copy of which is annexed to the Investment Advisors' Notice of Supplemental Authority dated July 29, 2008 as Exhibit A) does not change this result. In fact, that decision – which of course is not binding on this court – confirms that the instant motion should be denied.[1] For there, prior to a ruling on the competing lead plaintiff motions, the Investment Advisors submitted the additional "evidence" they now wish to submit herein. In stark contrast, here the Court -- based on the record before it – has already appointed a Lead Plaintiff. That Lead Plaintiff, the Carpenters Funds, along with their counsel, immediately took up the reins of this case on behalf of the class and conducted an intensive investigation of the original allegations set forth in the complaints filed to date. That investigation eventually led to the preparation and filing of a 105–page consolidated amended complaint in this case, to which defendants are in the process of responding. To allow the Investment Advisors to, in essence, re-litigate the Court's previous appointment of the Carpenters Funds as Lead Plaintiff at this stage of the case would turn the 60-day deadline set forth in the PSLRA on its head.

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[1] It should also be noted that in the *SLM* case, the "complicated" relationships among G&S and its offshore fund clients prompted the court to reject G&S as a proposed lead plaintiff and instead, appoint only Westchester as Lead Plaintiff.

CONCLUSION

For all the foregoing reasons, the Carpenters Funds respectfully request that the Court deny, in its entirety, the Investment Advisors' Motion for Reconsideration.

Dated: August 1, 2008

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PROOF OF SERVICE BY ELECTRONIC POSTING AND BY MAIL ON ALL KNOWN NON-REGISTERED PARTIES

I, the undersigned, say:

I am a citizen of the United States and am employed in the office of a member of the Bar of this Court. I am over the age of 18 and not a party to the within action. My business address is 1801 Avenue of the Stars, Suite 311, Los Angeles, California 90067.

On August 1, 2008, I caused to be served the following documents by posting such documents electronically to the ECF website of the United States District Court for the Southern District of California:

LEAD PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO WESTCHESTER AND G&S' MOTION FOR RECONSIDERATION

and, upon all others not so-registered but instead listed below:

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By Mail: By placing true and correct copies thereof in individual sealed envelopes, with postage thereon fully prepaid, which I deposited with my employer for collection and mailing by the United States Postal Service. I am readily familiar with my employer's practice for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, this correspondence would be deposited by my employer with the United States Postal Service that same day.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 1, 2008, at Los Angeles, California.

s/Tia Reiss______
Tia Reiss